

MONTANA PUBLIC DEFENDER COMMISSION  
**ELIGIBILITY AND COST RECOVERY COMMITTEE MEETING**

Goodkind Building  
139 North Last Chance Gulch, Helena, MT 59601

**June 11, 2013**

**MINUTES**

*(Approved at the July 18, 2014 Committee Meeting)*

**Committee Members Present**

Fritz Gillespie, Helena; Brian Gallik, Bozeman, Margaret Novak, Chester; Chuck Petaja, Helena

**Agency Team Members Present**

Wade Zolynski, Chief Appellate Defender; Bill Hooks, Chief Public Defender; Harry Freebourn, Administrative Director; Chris Thomas, Eligibility Specialist; Jessie Reehl, Administrative Assistant

**Interested Parties**

Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana; Megan Coy, Legislative Audit Division

**1. Call to Order**

Committee Chair Fritz Gillespie called the meeting of the Eligibility and Cost Recovery Committee to order at 1:00 p.m.

**2. Audit Compliance**

Chairman Gillespie invited public comment throughout the meeting. He and Legislative Auditor Megan Coy gave a summary of the performance audit findings related to client eligibility and the next steps in the audit process.

Ms. Coy recently requested the one-year update on the agency's progress in addressing the audit recommendations. The response is due at the end of June. Ms. Coy will then report to the audit committee at their fall meeting, which the agency is not expected to attend.

Chairman Gillespie said that the audit findings that there is a lack of consistency in determining eligibility between regions and that the agency fails to comply with internal policies and procedures are primarily due to a lack of resources. Eleven people doing eligibility determination for over 30,000 cases per year is daunting. However, he would like to see improvements in the verification process and in providing guidelines for

hardship determinations. He noted that the agency did not agree with the audit recommendation regarding the involvement of the regional deputy public defenders in the eligibility process. This might be an area that needs to be clarified in statute.

*A. New Indigency Questionnaire*

Chris Thomas, Eligibility Specialist, reviewed the changes made to the indigency questionnaire, now called the Application for Court-Appointed Counsel. She retained a good part of the previous form developed by Commissioner Petaja (including the false swearing section) while adding some enhancements and returning to a one-sided form. The asset area has been expanded, and information on incarceration and charges was added to provide more information in hardship determinations. Presumptive eligibility is a new area, and is based on how other states apply information that has already been collected by another agency to determine eligibility for benefits such as food stamps. There is also a new section on the form to document why an application hasn't been completed in certain instances (e.g. fugitives).

Chairman Gillespie asked if exemptions would be considered when making a hardship determination. Ms. Thomas replied that exemptions will be identified in policy, such as exempting the primary vehicle, certain livestock and business tools, or setting a limit on home equity or a maximum amount of assets that you can have and still qualify.

In regard to incarcerated clients who may not be able to provide proof of income, Chief Appellate Defender Wade Zolynski sees an internal inconsistency if the form says that documentation is required, but then it isn't actually mandatory. Ms. Thomas will try to rephrase that area.

Commissioners made some suggestions on fine tuning the form and what should be included in policy to ensure that interpreting the value of assets will be consistent. They congratulated Ms. Thomas on her work on the form.

Chairman Gillespie asked for clarification on rescissions. Is the motion to rescind filed only when requested documentation isn't provided, or when there is no application at all? Ms. Thomas said that not providing an application is grounds for rescission. When additional documentation is requested and not provided, it is at the discretion of the indigency determination specialist (IDS) to rescind, particularly in hardship determinations. The new application form says that all forms must be accompanied by proof of income, but it is up to the IDS to pursue the documentation or not depending on the situation. Chairman Gillespie noted that the more discretion given to the IDS, the greater the chance for lack of consistency. Both client compliance and IDS uniformity are important. The policy and training will provide those guidelines. Chairman Gillespie said that it is important to remember that the client is entitled to representation at every critical stage of the proceedings.

Uniformity and consistency can't be achieved without help from the courts. In Billings a

municipal court judge operates on a very short turnaround making it extremely difficult to obtain and process the applications before the case is resolved. The court doesn't appoint OPD if the client doesn't fulfill the judge's prescreening criteria. This illustrates the need to train not just OPD staff, but judges as well, especially in courts of limited jurisdiction, some of which operate on an ad hoc basis. Chairman Gillespie and Chief Public Defender Bill Hooks agreed that eliminating judicial influence on the right to counsel was an impetus for forming the agency and there could be a constitutional issue to address in this particular court.

For most of the 11 people assigned to do indigency determination this is one of their many tasks. In some regions multiple people gather information and pursue documentation, then provide it all to the IDS to make the final decision; in other regions the IDS does everything. Chairman Gillespie favors having a dedicated IDS for each region with other staff providing attorney support and performing other administrative tasks. This is the model used in Ms. Thomas's region; she feels that it is very efficient to do it that way and would like to see every office operate under the same system. Chairman Gillespie believes that flexibility in terms of leadership and case handling is fine, but administrative tasks must be done uniformly, and those more efficient methods should be imposed, keeping the needs of the small regions in mind. He asked Commissioner Gallik to take the lead for the committee and work with Ms. Thomas to develop policy and procedures to bring this about. Commissioners Petaja and Novak support the idea, and Commissioner Novak said that even small offices should be able to comply with implementing uniform administrative procedures.

*B. RDPD Involvement*

Chairman Gillespie suggested that there may need to be a statutory amendment related to the involvement of the regional deputies in the indigency determination process. The IDS needs to be able to go to a manager for assistance in determining if someone is entitled to services due to the large number of variables in determining hardship eligibility. Chairman Gillespie believes the spirit of the statute is to make sure individual attorneys are not making determinations, not to exclude the managers from the process. Ms. Thomas relies on her regional deputy to make sure that the impact of the charges and all legal consequences are considered when she is making a hardship determination. The regional deputy recuses himself for any case he is handling personally.

*C. Improved Hardship Process*

This will be addressed in the revised policy and training manual.

**3. Training Plan for New Procedures**

Mandatory training in the use of the new application form and associated policies and procedures will be conducted prior to implementation. A training manual will be developed and posted on the intranet, and ongoing training will be provided for new staff.

#### **4. Standard Operating Procedure Regarding Cost Recovery**

The committee discussed several issues related to cost recovery. There is an incredible lack of uniformity in how judges assess fees. Often the court does not conduct a meaningful hearing into whether the client has the ability to pay as required by statute. The information on the application form is considered confidential by administrative rule, but Chairman Gillespie thinks it should be admissible evidence in a meaningful hearing on ability to pay at sentencing—relating not just to public defender fees, but other fines, fees and costs assessed by the court.

Commissioner Petaja strongly believes that OPD should have nothing whatsoever to do with cost recovery. The client has already been determined to be indigent and it puts the agency in a clear conflict of interest situation in arguing for something detrimental to the client and creating a debtor/creditor relationship.

Chief Zolynski said that some courts are assessing fees as if they are mandatory, and they are not. The Supreme Court position is that if there is no objection at trial about the lack of inquiry into ability to pay, they will not reverse the district court sentence.

Chairman Gillespie would like to have this discussion at the commission level. Commissioner Petaja will summarize issues related to debt validation (related to the \$800 assessment for felonies) and possible violation of the debt collection act. The Commission should develop procedures for public defenders to follow in court. Field attorneys need guiding principles related to ability to pay from the application process to sentencing. Chief Hooks suggested including rules of professional ethics which require private counsel to explain charges and costs. Chief Zolynski is working on a document that will be an objection checklist for the trial attorneys.

#### **5. Public Comment**

There was no public comment.

#### **6. Adjourn**

The meeting adjourned at 3:10 p.m.